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11 *Plaintiff Vasudevan Software, Inc.*

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

15 VASUDEVAN SOFTWARE, INC.,

16 Plaintiff,

17 vs.

18 MICROSTRATEGY INCORPORATED,

19 Defendant.

Case No. 3:11-06637-RS-PSG

**PLAINTIFF VASUDEVAN SOFTWARE,
INC.'S REPLY IN SUPPORT OF
MOTION FOR SANCTIONS AGAINST
MICROSTRATEGY**

Date: January 24, 2013

Time: 1:30 pm

Location: 450 Golden Gate Avenue
San Francisco, California

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1 VSi seeks sanctions against MicroStrategy not merely because MicroStrategy filed a
2 petition to review a patent that is unrelated to MicroStrategy's business, but because
3 MicroStrategy threatened VSi and its counsel, and filed the petition to review Zillow's patent
4 ("Zillow Petition") for the purpose of extorting a settlement in this case. VSi submitted three
5 sworn declarations from witnesses who heard Jonathan Klein threaten VSi and Susman Godfrey,
6 and state his motivation for harming Susman Godfrey—to pressure VSi to dismiss its claims.
7 Tellingly, Mr. Klein did not submit a declaration denying his stated motives, and Mr. Sean Pak,
8 MicroStrategy's other witness to Mr. Klein's statements, also submitted no denial either.

10 MicroStrategy does not—because it cannot—deny that it engaged in the reprehensible
11 conduct at issue. Instead, MicroStrategy argues that it is immune from punishment unless this
12 Court delves into the merits of the Zillow Petition and finds that it is objectively baseless.¹ But
13 MicroStrategy is wrong on the law. The most recent Supreme Court precedent that
14 MicroStrategy cites *expressly rejected the notion that the immunity MicroStrategy claims applies*
15 *to Court sanctions*. Numerous other Supreme Court and Ninth Circuit cases confirm that the
16 Court has authority to sanction a litigant who engages in bad faith or who “is substantially
17 motivated by vindictiveness, obduracy, or mala fides,” under the Court's inherent powers,
18 without delving into the objective reasonableness of the litigant's conduct or filing.

21 This binding Supreme Court and Ninth Circuit precedent exists for a reason. Allowing
22 MicroStrategy to threaten its adversaries and file separate actions in bad faith to extort settlements
23 is a waste and misuse of administrative resources and a threat to its adversaries' right to a fair
24 hearing. The Court should sanction MicroStrategy to stop this abuse, and deter other defendants

26 ¹ MicroStrategy also opens its Opposition with a prejudicial and highly misleading review of
27 some of the discovery issues and motions practice in this case. Opposition at 1. VSi disputes
28 MicroStrategy's account of these matters, but will not engage in this side-show, as it has no
relevance to the instant Motion and is a transparent attempt to distract from the merits.

1 from engaging in this behavior as a Court-approved strategy to avoid the merits.

2 I.

3 MicroStrategy Does not Deny That it Threatened VSi and its Counsel And Filed the Zillow
4 Petition With a Vindictive and Improper Purpose to Extort a Settlement

5 VSi's motion for sanctions established three facts: (1) MicroStrategy threatened to harm
6 VSi and its counsel, Susman Godfrey, if VSi did not dismiss its lawsuit; (2) after VSi refused to
7 dismiss the suit, MicroStrategy made good on its threats and sought to harm VSi and Susman
8 Godfrey by filing the Zillow Petition; and (3) MicroStrategy's threats and actions were motivated
9 by its vindictive desire to extort a settlement from VSi.

10 VSi established MicroStrategy's threats with the sworn declarations of three attorneys
11 who personally witnessed MicroStrategy's then-General Counsel (now President) Jonathan Klein
12 threaten to harm VSi and Susman Godfrey. Motion at 4-5. Mr. Klein's threats included that he
13 would make VSi's litigation as "painful as possible" and take action against Susman Godfrey. *Id.*

14 VSi established MicroStrategy's efforts to harm VSi and Susman Godfrey by
15 demonstrating that, seven weeks after Mr. Klein threatened VSi and its counsel, MicroStrategy
16 filed the Zillow Petition, which has the potential to impose significant costs and delays upon
17 Susman Godfrey's separate client, Zillow. *Id.* at 5-9.

18 VSi established MicroStrategy's vindictive and extortive motivations in several ways. It
19 wasn't difficult. According to sworn testimony, *Mr. Klein told VSi's attorneys that he would take*
20 *action against Susman Godfrey if VSi did not dismiss its lawsuit.* *Id.* at 4-5. VSi demonstrated
21 that Mr. Klein signed and submitted the Zillow Petition seven weeks after his extortive threat. *Id.*
22 at 5-6. VSi also demonstrated that the patent MicroStrategy petitioned the PTO to review,
23 Zillow's patent, regards online automatic real estate valuations, and has nothing to do with
24 MicroStrategy's business intelligence software business. *Id.* at 6-7. Further, VSi demonstrated
25 that the only link between MicroStrategy and the patent MicroStrategy challenged is the fact that
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28

1 Brooke Taylor and Jordan Connors, the lawyers at whom Mr. Klein directed his threats, have
2 asserted the Zillow Patent in a lawsuit that MicroStrategy threatens. *Id.* Finally, VSi
3 demonstrated that MicroStrategy's conduct is part of a larger pattern of behavior from
4 MicroStrategy in which MicroStrategy wields legal and administrative procedures as clubs in bad
5 faith to harm its legal adversaries. *Id.* at 8-9.

7 In the face of these serious accusations and evidentiary support, MicroStrategy does not
8 deny that it engaged in the threats and harmful actions at issue. Nor does MicroStrategy deny its
9 extortive and vindictive motivations. *MicroStrategy does not even deny that it acted in bad faith.*
10 MicroStrategy's only substantive factual statement submitted along with its opposition is an
11 irrelevant statement from Jennifer Kash, an attorney who was not on the offending September 10
12 phone call, stating that she was unaware of MicroStrategy's threats and harmful actions back in
13 November, 2012. Opposition at 4. MicroStrategy submits no statement from Mr. Pak,
14 MicroStrategy's outside counsel who was on the September 10 phone call, or from Mr. Klein,
15 MicroStrategy's then-general counsel who made the threats against VSi, carried them out, and
16 stands accused of vindictive and extortionate motives.

18 Rather than deny the accused conduct and malicious motivations, MicroStrategy makes a
19 half-hearted attempt to argue that VSi failed to present enough evidence. MicroStrategy first
20 asserts that "VSI has presented no evidence of an improper purpose." Demonstrably false. *See*
21 *supra*; *see also* Motion at 5-9. MicroStrategy then shrugs off Mr. Klein's threats as "typical
22 statements made during settlement negotiations" and "entirely proper." Opposition at 8-9.
23 MicroStrategy also insinuates, but does not come out and say, that Mr. Klein's threats to take
24 action against Susman Godfrey regarded MicroStrategy's boilerplate counterclaim in this case,
25 filed in March, 2012, to seek its attorneys' fees. Opposition at 9. Finally, in a footnote,
26 MicroStrategy insinuates, but does not come out and say, that MicroStrategy filed the Zillow
27
28

1 Petition because “MicroStrategy’s software is, in any event, used by companies in the real estate
2 industry, the same field as the Zillow patent.” Opposition at 10 n.9.

3 But MicroStrategy’s indirect insinuations are not credible for the reasons explained below
4 and its lack of counter-evidence is glaring. If Mr. Klein had any motivation other than to harm,
5 threaten, intimidate, and extort, he would have submitted a sworn declaration stating his actual
6 motivation. If Mr. Klein did not, in fact, link his threat to harm Susman Godfrey with his demand
7 that VSi dismiss this lawsuit on the September 10 call, Mr. Pak would have so declared. If
8 MicroStrategy, a publicly owned company with a stated purpose to sell business intelligence
9 software, was using its shareholder-owned resources to launch a new endeavor to “quality check”
10 patents issued by the PTO, its public SEC filings would say so. If MicroStrategy’s true motive in
11 challenging the Zillow Patent was to serve some of its customers who happen to conduct business
12 in real estate, it would point to its communications and marketing efforts informing those
13 customers about what a comprehensive competitor-patent-quality-checking service MicroStrategy
14 provides. If Mr. Klein’s threats referred to MicroStrategy’s earlier boilerplate counterclaim about
15 attorneys’ fees, he wouldn’t have said “you’ll have to wait and see,” when Les Payne asked Mr.
16 Klein what he meant by his threat. If MicroStrategy’s filing of the Zillow Petition were anything
17 other than a targeted attack on Brooke Taylor, Jordan Connors, and Susman Godfrey’s business
18 as lawyers and as a law firm, MicroStrategy would be able to point to other review petitions that
19 it has filed that are unrelated to MicroStrategy’s business. MicroStrategy has no counter-
20 evidence to point to; all it has is indirect and incredible insinuations.

21 Accordingly, VSi’s evidence, including Mr. Klein’s own statements confirming his
22 vindictive and extortive motive, establishes that MicroStrategy threatened to harm VSi and its
23 counsel, acted in bad faith, and filed the Zillow Petition in an effort to extort a settlement.
24 MicroStrategy’s failure to offer evidence refuting these facts confirms them.

II.

The First Amendment Does not Immunize MicroStrategy From Court Sanctions for Threatening VSi and its Counsel and For Seeking to Harm VSi in Bad Faith

Rather than deny facts that MicroStrategy cannot deny, MicroStrategy argues that it is immune from punishment. MicroStrategy says that despite its threats to VSi and its counsel, its efforts to carry out those threats, and its motivation to extort a settlement from VSi, MicroStrategy is immune from any penalty or sanction by the First Amendment.

But MicroStrategy misleads the Court; as its argument is contravened by clear Supreme Court and Ninth Circuit precedent. MicroStrategy's argument that its bad faith conduct is immune from punishment is incorrect for four reasons: (1) as the Supreme Court has held, the *Noerr-Pennington* doctrine does not immunize litigants from sanctions under the Court's inherent powers, and no case MicroStrategy cited holds that it does so; (2) clear, binding Ninth Circuit precedent establishes that sanctions are appropriate "where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides" or "if the court specifically finds bad faith or conduct tantamount to bad faith"; (3) even if the First Amendment shielded MicroStrategy from liability for filing the Zillow Petition, VSi's motion concerns MicroStrategy's threats to VSi and its malicious use of the Zillow Petition to harm VSi's counsel in a collateral lawsuit, for which MicroStrategy has no immunity; and (4) the rule MicroStrategy advocates would grant MicroStrategy and other litigants *carte blanche* to employ judicial and administrative resources to threaten and intimidate, in bad faith, for their own extortive means.

A. The *Noerr-Pennington* Doctrine Relied on By MicroStrategy Does not Immunize any Activity From the Court's Inherent Sanctioning Authority

MicroStrategy says the law is the following: "[P]etitioning activity cannot be sanctioned or subject to liability unless the petition is objectively baseless, regardless of any allegedly improper subjective motivation." That statement is simply false. Opposition at 6. None of the

1 cases that MicroStrategy paraphrases actually support such a holding, and in fact, the most recent
2 Supreme Court case on which MicroStrategy relies expressly denies it.

3 The *Noerr-Pennington* doctrine, on which MicroStrategy relies, is a doctrine of statutory
4 interpretation that construes the Sherman Act not to apply to certain activity such as petitioning
5 the three branches of the government. See *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525
6 (2002). The interpretation is based “in part on the principle that we would not lightly impute to
7 Congress an intent to invade ... freedoms’ protected by the Bill of Rights, such as the right to
8 petition.” *Id.* at 525 (citations omitted). While the *Noerr-Pennington* doctrine has been applied
9 to construe other statutes as well, the doctrine has never been applied to grant litigants immunity
10 from the Court’s inherent power to sanction them for bad faith conduct.
11

12 To the contrary, in the most recent Supreme Court case on which MicroStrategy relies, *BE*
13 *& K Constr.*, the Court expressly denies that the First Amendment immunizes litigants from being
14 sanctioned even for activity that is protected by the First Amendment and not covered by the
15 Sherman Act and other statutes. In *BE & K Constr.*, the Court held that, while the National Labor
16 Relations Act did not impose liability upon reasonably based, unsuccessful lawsuits:

17
18 [N]othing in our holding today should be read to question the validity of
19 common litigation sanctions imposed by courts themselves—such as those
20 authorized under Rule 11 of the Federal Rules of Civil Procedure—or the
21 validity of statutory provisions that merely authorize the imposition of attorney's
22 fees on a losing plaintiff.

23 *BE & K Constr.*, 536 U.S. at 537 (all emphasis in this Reply is added). MicroStrategy cites the
24 case to support its immunity defense, but completely ignores the clear admonition from the
25 Supreme Court that litigation sanctions are not implicated by the doctrine. Thus, while
26 MicroStrategy’s cases may establish that *VSi cannot bring certain antitrust or NLRA claims*
27 against MicroStrategy for its malicious conduct and bad faith, MicroStrategy has no immunity
28 from litigation sanctions.

1 The other cases MicroStrategy cites are no more applicable and no more supportive of
2 MicroStrategy's claimed immunity. MicroStrategy cites a string of cases from other jurisdictions
3 to support its proposition that "[e]ven a court's inherent power, including the power to sanction, is
4 subject to the limitations imposed by the First Amendment." Motion at 6 & n.4. But all of those
5 cases merely discuss certain *remedies* imposed by courts and whether they run afoul of First
6 Amendment jurisprudence on prior restraints; none of the cases limits the kind of activity that
7 may be sanctioned in the first place. *See Bridge C.A.T. Scan Assoc. v. Technicare Corp.*, 710
8 F.2d 940 (2nd Cir. 1983) (concerning whether injunction granted by district court enjoining
9 disclosure of trade secret data constituted invalid prior restraint); *U.S. v. Carmichael*, 326 F.
10 Supp. 2d 1267, 1273 (M.D. Ala. 2004) (concerning whether court order requiring criminal
11 defendant to take down website proclaiming his innocence is valid prior restraint on free speech);
12 *George v. Industrial Maintenance Corp.*, 305 F. Supp. 2d 537, 543 (D. V. I. 2002) (concerning
13 whether to impose remedy that would impose limits on "dissemination of information regarding
14 hiring and pay practices" in light of First Amendment principles).

15 MicroStrategy also cites four cases to support propositions regarding the "objectively
16 baseless" litigation standard. Motion at 6-7. But none of these cases, or the others cited by
17 MicroStrategy, hold that the objectively baseless standard applies as a restriction on a court's
18 sanctioning authority under its inherent powers when a litigant has acted in bad faith. *See Prof'l*
19 *Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (concerning
20 antitrust liability, not court sanctions); *Globetrotter Software, Inc. v. Elan Computer Group*, 362
21 F.3d 1367 (Fed. Cir. 2004) (concerning state law business tort liability, not court sanctions); *GP*
22 *Indus., Inc. v. Eran Indus., Inc.*, 500 F.3d 1369 (Fed. Cir. 2007) (same); *Zaldivar v. Los Angeles*,
23 780 F.2d 823, 832 (9th Cir. 1986) (concerning the interpretation of FRCP 11, without any
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discussion of First Amendment).² In other words, MicroStrategy cites no case (and VSi is aware of none) that holds or suggests that petitioning activity that is objectively reasonable, but conducted in bad faith or for an improper purpose, has any immunity at all from, in the Supreme Court's words, litigation sanctions imposed by the courts themselves."

B. Binding Supreme Court and Ninth Circuit Precedent Establishes That Even Non-Frivolous Conduct Is Sanctionable if a Court Finds Bad Faith or an Improper Purpose

MicroStrategy's claimed immunity from punishment is also contradicted by clear, binding³ Ninth Circuit precedent. As VSi explained in its Motion, the Ninth Circuit does not require a court to consider the merits of an offending action in imposing sanctions, so long as the court finds bad faith or an improper purpose:

[f]or purposes of imposing sanctions under the inherent power of the court, a finding of bad faith does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorney's fees. ...

[S]anctions are available if the court specifically finds bad faith or conduct tantamount to bad faith. Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose.

² MicroStrategy also cites two cases for the limited proposition that courts have extended the *Noerr-Pennington* doctrine beyond antitrust suits. Motion at 6. But neither case held that activities such as filing petitions to harm your adversaries grant the petitioner immunity from the Court's inherent power to sanction litigants. See *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (dismissing RICO complaint based on pre-suit demand letters after construing RICO not to apply to such activity); *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1376-77 (Fed. Cir. 2011) (construing 35 U.S.C. § 285, which allows for attorneys' fees in patent suits that present "exceptional cases," not to apply to plaintiff's lawsuit because suit was not objectively baseless, but also recognizing, despite lack of objective baselessness, "a court can invoke its inherent power to award such fees in exceptional cases based upon a finding of bad faith").

³ In a patent case, the applicable regional circuit court (the Ninth Circuit here) supplies the applicable law to procedural issues that are not unique to patent law, such as sanctions under the Court's inherent authority. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75 (Fed. Cir. 1984), overruled on other grounds by *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985) ("[T]he Federal Circuit [] review[s] procedural matters, that are not unique to patent issues, under the law of the particular regional circuit court where appeals from the district court would normally lie.").

1 *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002).

2 MicroStrategy argues that this clear statement by the Ninth Circuit rejecting
3 MicroStrategy's position is either *dicta*, or the Ninth Circuit just got it wrong and it violates
4 Supreme Court precedent. Opposition at 7. The statement is not *dicta*. In *B.K.B. v. Maui Police*
5 *Dept.*, the Ninth Circuit upheld a district court's sanction (which included both attorneys' fees
6 and compensatory fees for "emotional damage") after defense counsel introduced improper
7 evidence of the plaintiff's sexual history at trial. *B.K.B.*, 276 F.3d at 1106. Under
8 MicroStrategy's purported statement of the law ("petitioning activity," which extends to actions
9 before the courts, cannot be sanctioned unless "objectively baseless" (Opposition at 6)), the
10 defense counsel would have been immune from the Court's inherent sanctioning power. But the
11 *B.K.B.* court did not delve into the objective basis for the defense counsel's introduction of the
12 offending evidence as MicroStrategy would have them do. Once the court found "counsel's
13 reckless and knowing conduct in this case was tantamount to bad faith," it held the conduct
14 "sanctionable under the court's inherent power." *Id.* at 1108.

17 *B.K.B.* accords with other precedent holding that once a court finds bad faith or an
18 improper purpose, it need not delve into the objective reasonableness or frivolousness of a
19 particular action in order to impose sanctions. The Ninth Circuit has repeatedly held that: "For
20 purposes of imposing sanctions under the inherent power of the court, a finding of bad faith 'does
21 not require that the legal and factual basis for the action prove totally frivolous; where a litigant is
22 substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable
23 claim will not bar the assessment of attorney's fees.'" *In re IteL Securities Litigation*, 791 F.2d
24 672, 675 (9th Cir. 1986) (quoting *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 182
25 (D.C. Cir. 1980) (per curiam)); *see also Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001)

(reviewing line of Ninth Circuit cases that required bad faith, recklessness, or an improper purpose for imposition of sanctions, but did not require that action be non-frivolous).

And this long line of Ninth Circuit cases is not contrary to Supreme Court precedent, as MicroStrategy asserts. As discussed above, the Supreme Court, in an opinion cited repeatedly by MicroStrategy, held that the *Noerr-Pennington* line of cases does not immunize activity from the court's power to impose litigation sanctions. *BE & K Constr.*, 536 U.S. at 537. Moreover, in *Roadway Express, Inc. v. Piper*, the Supreme Court summarized the bases on which a federal court may levy sanctions under its inherent power to a losing party in a lawsuit, including "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons...." *Roadway Express, Inc.*, 447 U.S. 752, 765-66 (1980). The Court did not mention MicroStrategy's purported additional requirement that the offending conduct must not be objectively baseless; that purported requirement finds no support in the law.

C. MicroStrategy's Threats and Extortion Are not Petitioning Activity

MicroStrategy's claimed immunity is legally incorrect for another reason as well—beyond the fact that it is contradicted by clear and repeated Supreme Court and Ninth Circuit precedents. MicroStrategy's claimed immunity relates to "[t]he petitioning of federal agencies." Opposition at 5. But VSi's motion is not concerned merely with the fact that MicroStrategy filed a petition before the PTO challenging Zillow's patent. VSi's motion concerns MicroStrategy's threats and efforts to harm VSi and its counsel. In isolation, MicroStrategy's re-exam petition would be odd, but not sanctionable.⁴ But when viewed in context of the VSi litigation against MicroStrategy

⁴ MicroStrategy's opposition states that "Reexaminations are therefore routinely sought by non-profit groups and companies that are under no threat of patent infringement litigation." Opposition at 9-10. However, the only example of a "For-profit compan[y]" that filed a petition for reexamination of a patent "unrelated to [its] business" that MicroStrategy could find was a petition filed by prior art search firm Article One. Opposition at 10 & n.8. Article One styles itself as "a global online community working to legitimize the validity of patents" and conducts contests by soliciting the public for prior art references against specific patents and then awarding

1 and MicroStrategy's threats against VSi and its counsel, the Zillow Petition represents a
2 sanctionable attempt to exert pressure and pain upon VSi and its counsel in an effort to force VSi
3 to dismiss its case against MicroStrategy, the stated goal of Mr. Klein.

4 In an effort to deflect attention from its threatening and extortive behavior, MicroStrategy
5 devotes only a single footnote to a purported immunity for its threats and pattern of litigation
6 abuses (Opposition at 6 n.5). No case suggests that these threats, sworn to by VSi's counsel and
7 not denied by MicroStrategy, are covered by First Amendment protection. MicroStrategy tells
8 the Court that "First Amendment protection also extends to pre-petitioning communications
9 related to the subsequent petition," and asserts therefore that "even alleged threats to file a
10 petition for reexamination cannot be sanctioned unless the petition is objectively baseless." *Id.*
11 But neither case cited related to threats to bring a collateral action against an adversary or an
12 adversary's counsel in an effort to force them to settle a claim. Both cases involved parties who
13 merely sent pre-suit demand letters to potential infringers of their patents prior to bringing suit.⁵
14 *See GP Indus., Inc. v. Eran Indus., Inc.*, 500 F.3d 1369, 1374-77 (Fed. Cir. 2007); *Sosa v.*
15 *DIRECTV, Inc.*, 437 F.3d 923, 934-35 (9th Cir. 2006). MicroStrategy points to no case in which
16 the First Amendment granted a party immunity for using an unrelated case to injure its litigation
17 adversary. Justice Stevens, in a concurring opinion in *Professional Real Estate*, has explained
18 that such use of a petition to impose a collateral injury would be a "sham" and thus would not
19 render the litigant immune from even antitrust liability, even if objectively reasonable:
20
21
22

23 _____
24 (... cont'd)

25 cash prizes to those who submit references that render the patents invalid. *See* Article One
26 website, *available at* <http://www.articleonepartners.com/> (last visited on January 14, 2013). So,
27 of course, all patent review petitions are related to Article One's business. MicroStrategy's
28 submitted no evidence of any relationship between the Zillow Patent and MicroStrategy's
business, other than the fact that MicroStrategy's Zillow Petition might be an effective means to
extort a lower settlement amount in this lawsuit.

⁵ And of course, neither case involved sanctions under the court's inherent authority because the
First Amendment does not immunize even petitioning activity from such sanctions.

1 The label “sham” is appropriately applied to a case, or series of cases, in which
2 the plaintiff is indifferent to the outcome of the litigation itself, but has
3 nevertheless sought to impose a collateral harm on the defendant by, for example,
4 impairing his credit, abusing the discovery process, or interfering with his access
5 to governmental agencies. It might also apply to a plaintiff who had some reason
6 to expect success on the merits but because of its tremendous cost would not
7 bother to achieve that result without the benefit of collateral injuries imposed on
8 its competitor by the legal process alone.

9 *Profl Real Estate Investors, Inc.*, 508 U.S. 49, 67-69 (1993) (Stevens, J., concurring).

10 Accordingly, *even if* the *Noerr-Pennington* doctrine applied in this case, and immunized
11 certain activities from the Court’s sanctioning power, MicroStrategy’s threats and efforts to use
12 the Zillow Petition to harm VSi and its counsel in a collateral action would not be immune.

13 **D. MicroStrategy’s Proposed Rule Would Invite Abuse**

14 Not only is MicroStrategy’s proposed rule, that filing a review petition with the PTO
15 grants the filer immunity from any sanction so long as it is not objectively baseless, contrary to
16 binding Supreme Court and Ninth Circuit law, it is dangerous and invites abuse. For example, in
17 the case at bar, if the Court were to hold that Mr. Klein’s threats and efforts to harm Susman
18 Godfrey are immune from punishment, MicroStrategy could continue to make good on its threat
19 to take action against Susman Godfrey. If all MicroStrategy would have to find is some “non-
20 objectively baseless” reason to petition for the review of other patents asserted by other Susman
21 Godfrey clients, MicroStrategy could delay and obstruct Susman Godfrey’s other litigation
22 matters by filing additional petitions, all in an effort to pressure VSi to settle. For large corporate
23 defendants with vast resources, filing review petitions in collateral actions to pressure legal
24 adversaries to settle their claims could become a viable and routine defense strategy. The court
25 should sanction MicroStrategy’s conduct in order to “send a message that [such] action...are
26 unacceptable in the practice of law.” *Kramer v. Tribe*, 156 F.R.D. 96, 109-10 (D.N.J. 1994)
27 (sanctioning lawyer for undertaking “whatever steps are necessary to dragoon a settlement,
28

1 including “threaten[ing] his adversaries with meritless harassing law suits and when those threats
 2 fail to motivate them to act in conformity with his desires, files the suits, resulting in a waste of
 3 time and resources for the parties as well as the courts”), *aff’d*, 52 F.3d 315 (3d Cir. 1995); *see*
 4 *also* Sandra Day O'Connor, Professionalism, 76 Wash. U. L.Q. 5, 8 (1998) (“When the lawyers
 5 themselves generate conflict, rather than focusing on the dispute between the parties they
 6 represent, it distorts our adversarial system.”).

8 III.

9 MicroStrategy’s Summary of PTO Procedure Is Inaccurate, and Zillow’s Right to Seek Further 10 Relief Before the PTO Does Not Immunize MicroStrategy From Relief in This Court for the 11 Harm and Threats it Has Inflicted on VSi

12 MicroStrategy also argues that the Court should not issue sanctions because the PTO has
 13 its own disciplinary procedures, and because Zillow need not incur the expense of responding to
 14 the Zillow Petition unless the PTO concludes that the petition raises a substantial new question of
 15 patentability. Opposition at 10-11. The first argument misses the point and the second argument
 16 is plainly wrong.

17 *First*, MicroStrategy’s statement that “Zillow is free to file a complaint with the Director
 18 of the Office of Enrollment and Discipline” makes no difference. *Id.* VSi’s sanctions motion
 19 regards MicroStrategy’s bad faith conduct in threatening and seeking to harm VSi and its counsel.
 20 MicroStrategy’s extortionate demand and continuing threat unquestionably relate to the instant
 21 action before this Court. VSi is not seeking the Court to “interpose itself as an enforcer of the
 22 PTO’s ethical rules,” as MicroStrategy suggests. VSi seeks a sanction order related to
 23 MicroStrategy’s bad faith and improper purpose in attempting to extort a dismissal in *this lawsuit*.

24 *Second*, MicroStrategy is simply wrong when it says that Zillow need not incur the
 25 expense of defending itself until the PTO makes some independent finding. *Id.* at 11.
 26 MicroStrategy’s citations relate to “*inter partes* reexamination” procedures, which expired as of
 27

1 September 15, 2012, according to the America Invents Act of 2011. Leahy-Smith America
2 Invents Act, Pub.L. No. 112-29, § 6, 125 Stat. 284, 299-305 (2011) (“AIA”). The now applicable
3 *inter partes* review procedures, allow a patent owner to file a preliminary response to a petition
4 prior to any ruling on the merit of the petition. *See* 35 U.S.C.A. § 313. Zillow intends to contest
5 MicroStrategy’s petition vigorously, and has retained outside counsel to file a preliminary
6 response. Declaration of Michelle Wynne ¶ 2, filed concurrently herewith. Accordingly,
7 MicroStrategy’s vindictive petition, filed in bad faith and for an improper purpose, will cause
8 Zillow and the PTO to expend time and resources regardless of its dubious merit.

10 IV.

11 VSi’s Sanctions Motion Complies With the Local Rules and the Federal Rules of Civil
12 Procedure; MicroStrategy’s Request for Attorneys’ Fees Does Not

13 MicroStrategy also argues that the motion does not conform to the Local Rules. In
14 particular, MicroStrategy cites Local Rules 37 and 54-5. Neither rule applies.

15 Local Rule 37 governs discovery disputes. While MicroStrategy’s discovery tactics are
16 certainly objectionable, *see* VSi’s Motion to Compel (Dkt. No. 124), they are not at issue in the
17 present motion. MicroStrategy’s effort to broadly transpose Rule 37’s limited requirements onto
18 VSi’s sanctions motion is yet another creative effort to shirk responsibility for its sanctionable
19 conduct, and should be rejected as such.

20 Local Rule 54-5 is also inapposite, applying only to post-judgment motions for attorneys’
21 fees. *See* L.R. 54-5(a) (explaining the time limit for filing a Rule 54 motion as “within 14 days of
22 entry of judgment” (emphasis added)). The cases MicroStrategy cites in its brief confirm the
23 same. *See, e.g., Edwards v. Marin Park, Inc.*, 91 F. App’x 14, 15 (9th Cir. 2004) (unpublished)
24 (addressing plaintiff’s “post-judgment motion for attorney fees as the ‘prevailing party’ in the
25 action under 42 U.S.C. § 3613” (emphasis added)). Of course, with no judgment entered, there
26 can be no post-judgment motion pending in this case.
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1 While the above rules do not apply, Local Rule 7-8 does. Unlike the rules cited in
2 MicroStrategy's brief, Rule 7-8 governs the form and timing of the present sanctions motion. *See*
3 Order of November 13, 2012 (Dkt. No. 135) (directing VSi to "comply with the dictates of
4 Federal Rule of Civil Procedure 11 and Local Rule 7-8 that govern motions for sanctions"). VSi
5 has followed these rules to the letter, appropriately observing the 21-day safe-harbor period and
6 separately filing its sanctions motion. MicroStrategy, to the contrary, has not separately filed its
7 belated request for attorneys' fees as a sanction for defending the present motion. *See*
8 *Summerfield v. Strategic Lending Corp.*, No. 09-cv-02609-HRL, 2010 WL 2509923, at *4 (N.D.
9 Cal. June 17, 2010) ("Civil Local Rule 7-8 states that all motions for sanctions must be separately
10 filed."). It is thus MicroStrategy, not VSi, that has failed to comply with the rules, and its request
11 for attorneys' fees should be rejected for that reason, in addition to its lack of merit.
12

13
14 V.

15 Appropriate Sanctions

16 VSi's motion for sanctions set forth the appropriate principles the Court should consider
17 in sanctioning MicroStrategy's bad faith conduct and set forth four potential sanctions for the
18 Court to consider. Motion at 13-14. MicroStrategy's argument that particular sanctions are
19 inappropriate are mere repetitions of MicroStrategy's repeated refrain that all MicroStrategy has
20 done here is "fil[e] an objectively reasonable petition for patent reexamination." Opposition at
21 12. MicroStrategy's failure to recognize the severity of facts that it has offered no evidence to
22 refute—that it threatened VSi and its counsel and then took efforts to harm them by filing a
23 collateral action in an effort to extort a settlement—confirms the need for serious sanctions in this
24 case. For this reason, and the reasons above, VSi respectfully requests the Court to grant VSi's
25 motion for sanctions.
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1 Dated: January 14, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2013, that a copy of the foregoing, and the accompanying declaration and exhibits, were filed electronically through the Court's CM/ECF system, with notice of case activity automatically generated and sent electronically to counsel of record for all parties.

/s/ Jordan Connors
Jordan Connors